Supreme Court, U.S.
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Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119, and 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET AL.,
Petitioners,

—v.—

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

PRIESTS FOR LIFE, ET AL.,
Petitioners,

—v.—

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

(*Caption continued on inside cover*)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD, FIFTH, TENTH, AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., THE NATIONAL COALITION ON BLACK CIVIC PARTICIPATION & THE NATIONAL URBAN LEAGUE, IN SUPPORT OF RESPONDENTS

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ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL.,

Petitioners,

—v.—

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

EAST TEXAS BAPTIST UNIVERSITY, ET AL.,

Petitioners,

—v.—

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.,

Petitioners,

—v.—

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

SOUTHERN NAZARENE UNIVERSITY, ET AL.,

Petitioners,

—v.—

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

GENEVA COLLEGE,

Petitioner,

—v.—

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

FACTUAL BACKGROUND 4

SUMMARY OF ARGUMENT 9

ARGUMENT 13

I. THE HISTORICAL MOVEMENT TOWARD GREATER EQUALITY FOR WOMEN AND RACIAL MINORITIES HAS BEEN ACCOMPANIED BY A GROWING REJECTION OF RELIGIOUS JUSTIFICATIONS FOR DISCRIMINATION IN THE MARKETPLACE 13

A. Racial Discrimination 13

B. Gender Discrimination 21

II. THIS COURT SHOULD NOT ALLOW THE EMPLOYERS HERE TO RESURRECT THE DISCREDITED NOTION THAT RELIGIOUS BELIEFS MAY TRUMP A LAW DESIGNED TO ENSURE EQUAL PARTICIPATION IN SOCIETY 28

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Berea College v. Commonwealth, 94 S.W. 623 (Ky. 1906), *aff'd*, 211 U.S. 45 (1908) 15

Bob Jones University v. United States, 461 U.S. 574 (1983) 18

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Bradwell v. State, 83 U.S. 130 (1872) 22

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Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) 8, 9, 12, 33

Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 19

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Forziano v. Independant Group Home Living Program, No. 13-cv-0370, 2014 WL 1277912 (E.D.N.Y. Mar. 26, 2014) 28

Frontiero v. Richardson, 411 U.S. 677 (1973) 21, 23

Ganzy v. Allen Christian School,
995 F. Supp. 340 (E.D.N.Y. 1998) 27

Green v. State, 58 Ala. 190 (Ala. 1877) 15

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680 F.3d 1316 (11th Cir. 2012) 27

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Hoyt v. Florida, 368 U.S. 57 (1961)..... 24, 30

International Union v. Johnson Controls, Inc.,
499 U.S. 187 (1991) 26

Kinney v. Commonwealth, 71 Va. 858 (Va. 1878).... 15

Lawrence v. Texas, 539 U.S. 558 (2003)..... 31

Loving v. Virginia, 388 U.S. 1 (1967)..... 18-19

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417 F. App'x 552 (7th Cir. 2011) 28

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538 U.S. 721 (2003) 23, 26, 30

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390 U.S. 400 (1968) 20

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Stanton v. Stanton, 421 U.S. 7 (1975) 25

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State v. Gibson, 36 Ind. 389 (Ind. 1871) 15

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The West Chester & Philadelphia Railroad v. Miles, 55 Pa. 209 (Pa. 1867) 15

United States v. Virginia, 518 U.S. 515 (1996) 26

Vigars v. Valley Christian Center, 805 F. Supp. 802 (N.D. Cal. 1992) 27

STATUTES

Title IX, Education Amendments of 1972, 20 U.S.C. § 1681(a)(3) 24

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 119 (2010), 42 U.S.C.A. § 300gg-13 4

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REGULATIONS

26 C.F.R. § 54.9815-2713A 8

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26 C.F.R. § 54.9815-2713A(b) 7

26 C.F.R. § 54.9815-2713A(c) 7

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45 C.F.R. § 147.130(b)(1) 6

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU has a long history of furthering racial justice and women's rights, and an equally long history of defending religious liberty. The ACLU also vigorously protects reproductive freedom, and has participated in almost every critical case concerning reproductive rights to reach the Supreme Court.

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of more than 200 national organizations committed to the protection of civil and human rights in the United States. It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movements—A. Philip Randolph of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, religious ideologies and sexual orientations. The Leadership Conference works to build an America that is inclusive and as good as its ideals, and to that end believes that the

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[1] The parties have filed blanket letters of consent to *amicus* briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

core values of religious freedom and legal and social equality are not incompatible; rather, this nation must stand united in ensuring religious liberty while continuing to work together to dismantle institutionalized discrimination.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a nonprofit legal organization that, for more than seven decades, has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has worked to support and provide equal treatment and high-quality medical services, care, and opportunities to African Americans. *E.g.*, *Linton v. Comm'r of Health & Env't*, 65 F.3d 508 (6th Cir. 1995) (preservation of Medicaid-certified hospital and nursing home beds to prevent eviction of patients in favor of admitting more remunerative private-pay individuals); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenge to closure of municipal hospital serving inner-city residents); *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (admission of African-American physician to hospital staff); *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F. Supp. 427 (S.D.N.Y. 1993) (relocation of services from inner-city branch of merged hospital entity); *Rackley v. Bd. of Trs. of Orangeburg Reg'l Hosp.*, 238 F. Supp. 512 (E.D.S.C. 1965) (desegregation of hospital wards); Consent Decree, *Terry v. Methodist Hosp. of Gary*, Nos. H-76-373, H-77-154 (N.D. Ind. June 8, 1979) (planned relocation of urban hospital services from inner-city community). LDF has also worked on a variety of cases challenging religious justifications for discrimination in public accommodations or services. *See, e.g.*, *Gifford v. McCarthy*, 23 N.Y.S.3d 422

(N.Y. App. Div. 2016). LDF has a substantial interest in this case because of its continuing commitment to promoting equal opportunity for African Americans, including access to affordable health insurance and health care.

The National Coalition on Black Civic Participation has been actively engaged in social justice movements on the national, state, and local level through our coalition-based campaigns and organizing networks for nearly four decades. The National Coalition is dedicated to the empowerment of women and girls and black youth, particularly Black males through its Black Women's Roundtable and Black Youth Vote! networks, leadership development, and civic engagement programs. The National Coalition believes that protecting individuals' right to worship, and to express their religious beliefs, and protecting reproductive freedoms, are key to the organization's empowerment goals.

The National Urban League is a historic civil rights organization dedicated to economic empowerment in historically underserved urban communities. Founded in 1910 and headquartered in New York City, the National Urban League improves the lives of more than two million people annually through direct service programs, including education, employment training and placement, housing, and health, which are implemented locally by more than 90 National Urban League affiliates in 300 communities across 36 states and the District of Columbia. The National Urban League works to provide the guarantee of civil rights for the underserved in America. Recognizing that economic

empowerment in underserved communities is inextricably linked to the reduction of racial health disparities in America, the organization has established the goal that by 2025 every American has access to quality and affordable health care solutions.

FACTUAL BACKGROUND

The Affordable Care Act requires health insurance plans to cover certain preventive services without cost-sharing. Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 119, 131–32 (2010) (codified at 42 U.S.C.A. § 300gg-13). The Women's Health Amendment ("WHA") was adopted during debate over the ACA to ensure that the list of covered services would include preventive services unique to women. *Id.* § 2713(a)(4), 124 Stat. at 131. In passing the WHA, Senator Mikulski noted, "[o]ften those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles . . . ." 155 Cong. Rec. S11,979, S11,988 (daily ed. Nov. 30, 2009); *see also id.* at S11,987 (noting that the ACA as initially drafted did not cover key preventive services for women). In particular, the WHA was intended to address gender disparities in out-of-pocket health care costs, which stem in large part from reproductive health care. As Senator Gillibrand explained:

> Not only do we [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age

> spend 68 percent more in out-of-pocket health care costs than men. . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.

155 Cong. Rec. S12,019, S12,027 (daily ed. Dec. 1, 2009).

Recognizing the importance of preventive services for both men and women, Congress then delegated the responsibility for developing a list of preventive services covered by the ACA to the Department of Health and Human Services ("HHS"). HHS, in turn, asked the Institute of Medicine ("IOM"), an independent, nonprofit organization, to recommend services that should be covered. IOM recommended that the covered preventive services include, among other things, the full range of contraceptives approved by the Food and Drug Administration ("FDA"). Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 109-10 (July 2011). In making this recommendation, IOM noted that "[d]espite increases in private health insurance coverage of contraception since the 1990s, many women do not have insurance coverage or are in health plans in which copayments for visits and for prescriptions have increased in recent years." *Id.* at 109. It further noted that these cost barriers are aggravated by the fact that women "typically

earn less than men and . . . disproportionately have low incomes." *Id.* at 19.

Adopting IOM's recommendations, HHS promulgated regulations that require non-grandfathered plans covered by the ACA to provide health care coverage without cost-sharing for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," commonly referred to as the "contraceptive requirement." *See* 45 C.F.R. § 147.130(b)(1); Health Res. & Servs. Admin., U.S. Dep't of Health & Human Servs., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, http://www.hrsa.gov/womensguidelines (last visited Feb. 9, 2016).

In announcing the regulations, HHS emphasized the importance of including contraception in the designated list of preventive services, not only to equalize women's health care costs but also to help women become equal participants in society. The inability of women to access contraception, HHS noted,

> places women in the workforce at a disadvantage compared to their male co-workers. Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of

> the job force . . . . The [federal government] aim[s] to reduce these disparities by providing women broad access to preventive services, including contraceptive services.

77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (footnote omitted).

The federal government also developed an "accommodation" for religiously affiliated nonprofit organizations that have religious objections to covering contraception.[2] Under this accommodation, eligible employers who object on religious grounds can fill out a one-page form to opt out of providing coverage "for some or all of any contraceptive items or services required to be covered." 26 C.F.R. § 54.9815-2713A(a); Ctrs. for Medicare & Medicaid Servs. Form No. CMS-10459: Coverage of Certain Preventive Services under the Affordable Care Act (2015). This form can be sent to either the insurance company or the federal government. 26 C.F.R. § 54.9815-2713A(a)(3). The insurance company then administers and pays for those contraceptive services, including by communicating with the employees about the coverage.[3] *Id.* § 54.9815-2713A(c)-(d).

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[2] In addition, the regulations authorize an exemption for the group health plan of a "religious employer," 45 C.F.R. § 147.131(a), which is not challenged in this case.

[3] Employers that self-insure must provide their third party administrators with a copy of the self-certification form. 26 C.F.R. § 54.9815-2713A(b). The third party administrator will similarly notify the organization's employees that it will be providing payments for contraceptive services. *Id.* § 54.9815-2713A(d). The rule explicitly prohibits the third party

In response to this Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the accommodation for religiously affiliated nonprofit organizations was recently extended to "closely held" for-profit companies. Indeed, the majority in *Hobby Lobby* relied on this accommodation in finding that the original contraception rule violated the Religious Freedom Restoration Act ("RFRA") as applied to closely held for-profit companies:

> HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. . . . We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. . . . The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.

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administrator from "imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly on" the organizations or their employees for the separate contraception payments. *Id.* § 54.9815-2713A.

134 S. Ct. at 2759-60; *see also id.* at 2786 (the "accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs") (Kennedy, J., concurring). The employers in the instant cases challenge the very accommodation that this Court relied on in *Hobby Lobby*.

SUMMARY OF ARGUMENT

The government argues that the Religious Freedom Restoration Act does not require any further accommodation of Petitioners' religious beliefs and does not mandate any further dilution of the rights of employees who seek access to the contraceptive coverage benefit guaranteed by law. *Amici* agree, and we do not repeat those arguments here. Instead, we submit this brief to highlight an important lesson of history: As our society has moved toward greater equality for racial minorities and women, it has increasingly and properly rejected the idea that religion can be used as a justification for discrimination in the marketplace. Petitioners' challenge to the accommodation should likewise be rejected.

Religion is a powerful force that shapes individual lives and influences community values. Like other belief systems, it has been used at different times and places to support change and to oppose it, to promote equality and to justify inequality. Our constitutional structure recognizes the importance of religion by protecting its free exercise, and a full range of statutes and regulations reinforce our collective commitment to religious tolerance and pluralism. This Court in *Hobby Lobby* understood the accommodation that is being

challenged in this case as a reflection of that commitment. Critically, however, the accommodation also recognizes that access to contraceptive care is an important means of ending discrimination against women in the workplace, and that the elimination of such discrimination in the marketplace is a compelling state interest.

The struggle to overcome discrimination while respecting religious liberty is a recurring challenge in our nation's history. By recounting that history in this brief, we do not question Petitioners' religious faith or suggest that the historical invocation of religion to justify the most odious forms of racial discrimination is equivalent to the religious claims that Petitioners have raised here. But that is not the test and should not be the legal measuring rod. As this Court recently observed in *Obergefell v. Hodges*, religious objections to anti-discrimination laws are often "based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." 135 S. Ct. 2594, 2602 (2016).

Religious leaders – like Dr. Martin Luther King, Jr. – have often led the movement against discrimination. Throughout our history, however, religion has also been used to defend discriminatory practices, to oppose evolving notions of equality, and

to seek broad exemptions to new legal norms. We can and should learn from that experience.[4]

From the early years of the Republic, religious beliefs were used to justify racial subordination, including the forced enslavement of Africans. Far too often, moreover, those views found support in judicial decisions upholding racial segregation and anti-miscegenation laws. Even as the nation's standards evolved to prohibit racial discrimination in employment, education, marriage, and public accommodations, religious arguments continued to be used to fuel resistance to progress. In particular, Congress and the courts faced repeated calls for religious exemptions to non-discrimination standards. But, by the middle of the twentieth century, those calls were rejected by both the Courts and Congress. Instead, the country came to recognize the vital state interest in ending racial discrimination in public arenas and in embracing a vision of equality that does not sanction piecemeal application of the law.

The story of women's emerging equality follows a similar pattern. Religious beliefs were invoked to justify restrictions on women's roles, including in suffrage, employment, and access to birth control. Later, religion inspired legislation purportedly designed to "protect" women, including their reproductive capacities. As attitudes changed, laws were enacted prohibiting discrimination and protecting women's ability to control their

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[4] This brief focuses on efforts to justify discrimination against racial minorities and women on religious grounds, but other disadvantaged and marginalized groups have shared similar experiences. *See* 27 n.11, *infra*.

reproductive capacity. These measures, like those designed to promote racial equality, were met with resistance, including religiously motivated requests to avoid compliance with evolving legal standards. And, as with race, Congress and the courts have held firm to the vision embodied in newly passed anti-discrimination measures.

The contraception rule addresses a remaining vestige of sex discrimination. As this Court has recognized, women's ability to control their reproductive capacities is essential to their participation in society. Contraception is not simply a pill or a device; it is a tool, like education, essential to women's equality. Without access to contraception, women's ability to complete an education, to hold a job, to advance in a career, to care for children, or to aspire to a higher place, whatever that may be, may be significantly compromised. By making access to contraception meaningful for many women, the contraception rule takes a giant and long overdue step to level the playing field.

Petitioners ask to be wholly exempt from the contraception rule, arguing that their faith prohibits them from asking for the accommodation, and that the government should be prohibited from requiring the insurance company to provide separate coverage to their employees. *Hobby Lobby* does not support this position, and *Hobby Lobby*'s reasoning is irreconcilable with what Petitioners now seek. Employers do not forfeit their individual right to oppose contraceptives on religious grounds, but a personal religious objection is not a license to disregard the law.

ARGUMENT

I. THE HISTORICAL MOVEMENT TOWARD GREATER EQUALITY FOR WOMEN AND RACIAL MINORITIES HAS BEEN ACCOMPANIED BY A GROWING REJECTION OF RELIGIOUS JUSTIFICATIONS FOR DISCRIMINATION IN THE MARKETPLACE.

A. Racial Discrimination

There was a time in our nation's history when religion was used to justify slavery, Jim Crow laws, and bans on interracial marriage. God and "Divine Providence" were invoked to validate segregation, and, for decades, these arguments trumped secular and religious calls for equality and humanity. Eventually, due to evolving societal attitudes and the steadfast efforts of civil rights advocates, systems of enslavement and segregation were dismantled, and those who clung to religious justifications for racial discrimination were nonetheless required to obey the nation's anti-discrimination laws. Although the history of religious justification for slavery, racial discrimination, and racial segregation are different in many ways from the instant request for a religious exemption, the lessons derived from that experience are instructive.

Early in our country's history, religious beliefs were invoked to justify the most fundamental of inequalities. Indeed, slavery itself was often defended in the name of faith. The Missouri Supreme Court, in rejecting Dred Scott's claim for freedom, suggested that slavery was "the providence of God" to rescue an "unhappy race" from Africa and place them

in "civilized nations." *Scott v. Emerson*, 15 Mo. 576, 587 (Mo. 1852). Jefferson Davis, President of the Confederate States of America, proclaimed that slavery was sanctioned by "the Bible, in both Testaments, from Genesis to Revelation." R. Randall Kelso, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 Quinnipiac L. Rev. 433, 437 (2011) (citation and quotations omitted). Christian pastors and leaders declared: "We regard abolitionism as an interference with the plans of Divine Providence." Convention of Ministers, *An Address to Christians Throughout the World* 8 (1863), https://archive.org/details/addresstochristi00phil (last visited Feb. 9, 2016).

Religion was also invoked, including by the courts, to justify anti-miscegenation laws. For example, in upholding the criminal conviction of an African-American woman for cohabitating with a white man, the Georgia Supreme Court held that no law of the State could

> attempt to enforce [ ] moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it.

Scott v. State, 39 Ga. 321, 326 (Ga. 1869). In upholding the criminal conviction of an interracial couple for violation of Virginia's anti-miscegenation law, the Virginia Supreme Court reasoned that, based on "the Almighty," the two races should be kept "distinct and separate, and that connections and

alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law and be subject to no evasion." *Kinney v. Commonwealth*, 71 Va. 858, 869 (Va. 1878); *see also Green v. State*, 58 Ala. 190, 195 (Ala. 1877) (upholding conviction for interracial marriage, reasoning God "has made the two races distinct"); *State v. Gibson*, 36 Ind. 389, 405 (Ind. 1871) (declaring right "to follow the law of races established by the Creator himself" to uphold constitutionality of conviction of a black man who married a white woman).

Similar justifications were accepted by courts to sustain segregation. In 1867, Mary E. Miles defied railroad rules by refusing to take a seat in the "colored" section of the train car. She brought suit against the railroad for physically ejecting her from the train. A jury awarded Ms. Miles five dollars. The Supreme Court of Pennsylvania reversed, relying in part on "the order of Divine Providence" that dictates that the races should not mix. *The West Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 213 (Pa. 1867); *see also Bowie v. Birmingham Ry. & Elec. Co.*, 27 So. 1016, 1018-19 (Ala. 1900) (looking to reasoning from *Miles* to affirm judgment for railroad that forcibly ejected African-American woman from the "whites only" section of rail car). In 1906, the Kentucky Supreme Court affirmed the enforcement of a law prohibiting whites and blacks from attending the same school, noting that the separation of the races was "divinely ordered." *Berea College v. Commonwealth*, 94 S.W. 623, 626 (Ky. 1906), *aff'd*, 211 U.S. 45 (1908).[5]

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[5] Religious justifications for segregation also had a direct impact on the availability and quality of health care for African

These religious arguments in favor of racial segregation slowly lost currency, but not without resistance. The turning point in our country's history was marked by two events. The first was this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which repudiated the "separate but equal" doctrine established in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and declared racial segregation in public schools to be unconstitutional. The second was Congress's passage of the Civil Rights Act of 1964, which prohibited discrimination in public schools, employment, and public accommodations.

The resistance to the movement for racial equality, both religiously based and other, was particularly intense in the context of education. Members of the Florida Supreme Court invoked religion to justify resistance to integration in the schools, noting that "when God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man." *State ex rel. Hawkins v. Bd. of Control*, 83 So. 2d 20, 28 (Fla. 1955) (concurring opinion). Indeed, they went so far as to characterize *Brown* as advising

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Americans. *See, e.g.*, Sidney D. Watson, *Race, Ethnicity and Quality of Care: Inequalities and Incentives*, 27 Am. J.L. & Med. 203, 211 (2001) ("Historically, most hospitals were 'white only.' The few hospitals that admitted Blacks strictly limited their numbers [and] segregated [the facilities and equipment]"); Kevin Outterson, *Tragedy and Remedy: Reparations for Disparities in Black Health*, 9 DePaul J. Health Care L. 735, 757 (2005) ("Many hospitals were not available to Blacks in the first half of the twentieth century.").

"that God's plan was in error and must be reversed." *Id.*

In the years following this Court's enforcement of *Brown*, the number of private, often Christian, segregated schools expanded exponentially and white students left the public schools in droves. *See* Note, *Segregation Academies and State Action*, 82 Yale L.J. 1436, 1437-40 (1973). *See also* U.S. Comm'n on Civil Rights, *Discriminatory Religious Schs. and Tax Exempt Status* 1, 4-5 (1982) (recounting the massive withdrawal of white students from public schools after *Brown*, and a proliferation of private schools, many associated with churches). The schools were often open about their motives. For example, Brother Floyd Simmons, who founded the Elliston Baptist Academy in Memphis, said, "I would never have dreamed of starting a school, hadn't it been for busing." John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 334 (2001).

In response, the Treasury Department issued a ruling declaring that racially segregated schools would not be eligible for tax-exempt status.[6] Attempts by the IRS to enforce the Treasury

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[6] Subsequent efforts by the IRS to adopt guidelines for assessing whether private schools were not discriminatory, and thus eligible for tax exempt status, met with resistance. At a hearing, for example, Senators expressed concern about the impact on religious schools, emphasizing that the issue "involve[d] the rights of two groups of minorities." *See Tax-Exempt Status of Private Schs.: Hearing Before the Subcomm. on Taxation & Debt Mgmt. Generally of the Comm. on Fin.*, 96th Cong. 18, 21 (1979) (statement by Sen. Laxalt).

Department's rule met resistance in the courts. Most notably, Bob Jones University brought suit after the IRS revoked the University's tax exempt status based first on its policy of refusing to admit African-American students, and subsequently on its policy of refusing to admit students engaged in or advocating interracial relationships. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). The sponsors of Bob Jones University "genuinely believe[d] that the Bible forbids interracial dating and marriage." *Id.* at 580. Bob Jones's lesser-known co-plaintiff, Goldsboro Christian Schools, operated a school from kindergarten through high school and refused to admit African-American students. According to its interpretation of the Bible, "[c]ultural or biological mixing of the races [was] regarded as a violation of God's command." *Id.* at 583 n.6. Both schools sued under the Free Exercise Clause, arguing that the rule could not constitutionally apply to schools engaged in racial discrimination based on sincerely held religious beliefs. This Court rejected the schools' claims, holding that the government's interest in eradicating racial discrimination in education outweighed any burdens on religious beliefs. *Id.* at 602-04.

Progress toward racial equality was not limited to schools. Although the anti-miscegenation laws eventually fell, the path to that rightful conclusion was not a smooth one. The trial court in *Loving v. Virginia* adhered to the reasoning of earlier decades: "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races

shows that he did not intend for the races to mix.'" 388 U.S. 1, 3 (1967) (quoting trial court). But this Court expressly rejected the trial court's reasoning and declared Virginia's anti-miscegenation law unconstitutional. *Id.* at 2.

The Civil Rights Act of 1964 also faced objections based on religion, all of which were ultimately rejected. Most notably, the House exempted religiously affiliated employers entirely from the proscriptions of the Act. *See EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) (recounting legislative history of Civil Rights Act of 1964). However, the law, as enacted, permitted no employment discrimination based on race; it only authorized religiously affiliated employers to discriminate on the basis of religion. *Id.* Later efforts to pass a blanket exemption for religiously affiliated employers again failed. *Id.* at 1277.[7]

Religious resistance to the 1964 Civil Rights Act did not stop with its passage. The owner of a barbeque chain who was sued in 1964 for refusing to serve blacks responded by claiming that serving black people violated his religious beliefs. The court rejected the restaurant owner's defense, holding that the owner

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[7] The Act, while barring race discrimination by religiously affiliated entities, respects the workings of houses of worship and also permits discrimination in favor of co-religionists in certain religiously affiliated institutions and positions. *See Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (recognizing ministerial exception).

> has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens.

Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

Since the middle of the twentieth century, the argument that religious beliefs trump measures designed to eradicate racial discrimination – whether in toto or piecemeal – has slowly lost its force. As courts shifted to a wholesale rejection of religious justifications for racial discrimination and societal attitudes evolved, religious arguments were no longer offered in mainstream society to defend racial segregation and subordination. In fact, "no major religious or secular tradition today attempts to defend the practices of the past supporting slavery, segregation, [or] anti-miscegenation laws." R. Randall Kelso, Modern Moral Reasoning, *supra*, at 439. Reflecting this evolution, Bob Jones University has apologized for its prior discriminatory policies, stating that by previously subscribing to a

> segregationist ethos . . . we failed to accurately represent the Lord and to fulfill the commandment to love others as ourselves. For these failures we are profoundly sorry. Though no known antagonism toward minorities or expressions of racism on a personal

> level have ever been tolerated on our campus, we allowed institutional policies to remain in place that were racially hurtful.

See Statement about Race at BJU, Bob Jones Univ., http://www.bju.edu/about/what-we-believe/race-statement.php (last visited Feb. 9, 2016). Although there are many differences in the discrimination described above and the contraception rule, this history highlights the hazards of recognizing a religious exemption to a federal anti-discrimination measure that promotes a compelling governmental interest in equality and opportunity.

B. Gender Discrimination

The path to achieving women's equality has followed a course similar to the struggle for racial equality. *See Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (chronicling the long history of sex discrimination in the United States).[8] Efforts to advance women's equality, like those furthering other civil rights, were supported – and thwarted – in the name of religion. Those who invoked God and faith as justification for slavery and segregation also invoked God and faith to limit women's roles. One champion of slavery in the antebellum South, George Fitzhugh, plainly stated that God gave white men dominion over "slaves, wives, and children."

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[8] The Court in *Frontiero* noted that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes," emphasizing that women, like slaves, could not "hold office, serve on juries, or bring suit in their own names," and that married women traditionally could not own property or even be legal guardians of their children. 411 U.S. at 685.

Armantine M. Smith, *The History of the Woman's Suffrage Movement in Louisiana*, 62 La. L. Rev. 509, 511 (2002).

Religious arguments were invoked to limit women's roles in society. And in this context, as with race, these arguments were initially embraced by courts. For example, this Court held that the State of Illinois could prohibit women from practicing law, and in his famous concurrence, Justice Bradley opined that:

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

This vision of women – as divinely destined for the role of wife and mother – was a prominent argument against suffrage. A leading antisuffragist, Reverend Justin D. Fulton, proclaimed: "'It is patent to every one that this attempt to secure the ballot for woman is a revolt against the position and sphere assigned to woman by God himself.'" Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 981 n.96 (2002) (quoting Rev. Justin D. Fulton, *Women vs. Ballot*, *in* The True Woman: A

Series of Discourses: To Which Is Added Woman vs. Ballot 3, 5 (1869)); *see also id.* at 978 (quoting Rep. Caples at the California Constitutional Convention in 1878-79 as saying of women's suffrage: "It attacks the integrity of the family; it attacks the eternal degrees [sic] of God Almighty; it denies and repudiates the obligations of motherhood.") (internal citation and quotations omitted). It was in this same time period that the first laws against contraception were enacted to address what was characterized as "physiological sin." Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 292 (1991) (quoting H.S. Pomeroy, *The Ethics of Marriage* 97 (1888)); *see also id.* at 293 (quoting physician in lecture opposed to interruption of intercourse: "She sins because she shirks those responsibilities for which she was created.").

Even as times changed, and women began entering the workforce in greater numbers, they were constrained by the longstanding and religiously imbued vision of women as mothers and wives. As this Court recognized in *Frontiero*, "[a]s a result of notions such as [those articulated in Justice Bradley's concurrence in *Bradwell*], our statute books gradually became laden with gross, stereotyped distinctions between the sexes." 411 U.S. at 685.[9]

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[9] Concomitant with a restricted vision of women's roles were constraints on the roles of men. In the idealized role, men were heads of households, the wage earners, and the actors in the polity. They were not caretakers, for example. *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (recognizing that the historic "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men"). And, for both

Those statutes were often upheld by this Court. For example, in *Muller v. Oregon*, this Court upheld workday limitations for women because "healthy mothers are essential to vigorous offspring, [and therefore] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." 208 U.S. 412, 421 (1908); *see also Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (holding women should be exempt from mandatory jury duty service because they are "still regarded as the center of home and family life").

But just like society's views of race evolved, society's views of women progressed, and gradually women's ability to pursue goals other than, or in addition to, becoming wives and mothers was recognized. Indeed, the passage of the Civil Rights Act of 1964 was a step forward for race and gender equality because Title VII of the Act barred discrimination based on sex and race in the workplace. The protection against gender discrimination, like that for race, passed in the face of religious objection and without the proposed exemption that sought to permit religiously affiliated organizations to engage in gender-based employment discrimination.[10]

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sexes, these visions were idealized, and unrealistic for many households, particularly those of the working poor, where women as well as men labored outside the home.

[10] *But see* Title IX, Education Amendments of 1972, 20 U.S.C. § 1681(a)(3) (providing an exemption for "an educational institution which is controlled by a religious organization if the application of [Title IX] would not be consistent with the religious tenets of such organization").

Slowly the courts, too, began dismantling the notion that divine ordinance and the law of the Creator requires women to be confined to roles as wives and mothers. For example, this Court held a state law that treated girls' and boys' age of majority differently for the purposes of calculating child support unconstitutional, rejecting the state's argument that girls do not need support for as long as boys because they will marry quickly and will not need a secondary education. *Stanton v. Stanton*, 421 U.S. 7 (1975). This Court reasoned:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice.

Id. at 14-15 (internal citation omitted); *see also Orr v. Orr*, 440 U.S. 268, 279 n.9 (1979) (holding unconstitutional law that allowed alimony from husbands but not wives, as "part and parcel of a larger statutory scheme which invidiously discriminated against women, removing them from the world of work and property and 'compensating' them by making their designated place 'secure'"). Additionally, when striking a ban on the admission

of women to the Virginia Military Institute, this Court noted:

> "Inherent differences" between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications . . . may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.

United States v. Virginia, 518 U.S. 515, 533-34 (1996) (internal citations omitted).

The Court has also dismantled notions that women could be barred from certain jobs because of their reproductive capacity, *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), and has affirmed legislation that addresses "the fault-line between work and family – precisely where sex-based overgeneralization has been and remains strongest," *Hibbs*, 538 U.S. at 738. The courts and Congress have thus recognized that "denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second." *Id.* at 736 (internal citations and quotations omitted).

As with race, this progress has been tested by religious liberty defenses to the enforcement of anti-discrimination measures. Religious schools resisted the notion that women and men must receive equal compensation by invoking the belief that the "Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family." *Dole v.*

Shenandoah Baptist Church, 899 F.2d 1389, 1392 (4th Cir. 1990). The courts rejected this claim, emphasizing a state interest of the "highest order" in remedying the outmoded belief that men should be paid more than women because of their role in society. *Id.* at 1398 (citations and quotations omitted); *see also EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (same); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (same).

Even today, laws and policies designed to protect against gender discrimination continue to face challenges in the name of religious belief, but courts have limited such arguments. *See, e.g.*, *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right, based on its opposition to premarital sex, to fire teacher for becoming pregnant outside of marriage, holding that the school seemed "more concerned about her pregnancy and her request to take maternity leave than about her admission that she had premarital sex"); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) (holding that a religious school could not rely on its religious opposition to premarital sex as a pretext for pregnancy discrimination, noting that "it remains fundamental that religious motives may not be a mask for sex discrimination in the workplace"); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808-10 (N.D. Cal. 1992) (same).[11]

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[11] Attempts to use religion to discriminate are not limited to race and sex. *See, e.g.*, The Leadership Conference Education Fund, *Striking a Balance: Advancing Civil and Human Rights*

II. THIS COURT SHOULD NOT ALLOW THE EMPLOYERS HERE TO RESURRECT THE DISCREDITED NOTION THAT RELIGIOUS BELIEFS MAY TRUMP A LAW DESIGNED TO ENSURE EQUAL PARTICIPATION IN SOCIETY.

The contraception rule, like Title VII and other anti-discrimination measures, is an effort to address the vestiges of gender discrimination. And like those other anti-discrimination laws, this rule is being resisted in the name of religion.[12] The employers before this Court argue that they are entitled to evade the mandates of the law based on their religious beliefs. As discussed *supra*, the argument that religious belief justifies discrimination, the

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While Preserving Religious Liberty (Jan. 2016), http://civilrightsdocs.info/pdf/reports/2016/religious-liberty-report-WEB.pdf. For example, religion has been invoked in an attempt to justify discrimination based on marital status, *see Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), and discrimination based on sexual orientation, *see, e.g.*, *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004); *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552 (7th Cir. 2011); Br. of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc. in Supp. of Respondent. It is also a concern for people with disabilities, who have historically faced limitations from religiously affiliated group homes, including the refusal to allow them to live with romantic partners, even if married. *See Forziano v. Indep. Grp. Home Living Program*, No. 13-cv-0370, 2014 WL 1277912 (E.D.N.Y. Mar. 26, 2014).

[12] Although the employers in this case have religious objections to the rule, not all people of faith share their objection. *See, e.g.*, Tom Howell, Jr., *Catholic Hospitals are OK with Obama Contraception Mandate, Protections*, Wash. Times, July 9, 2013, http://www.washingtontimes.com/blog/inside-politics/2013/jul/9/report-catholic-hospital-ok-contraception-mandate/ (last visited Feb. 9, 2016).

denial of rights, or the relinquishment of benefits is an old, discredited theory that should, once again, be rejected.

The contraception rule has, and will continue to, transform women's lives, by enabling women to decide if and when to become a parent and allowing women to make educational and employment choices that benefit themselves and their families.[13] "Women who can successfully delay a first birth and plan the subsequent timing and spacing of their children are more likely than others to enter or stay in school and to have more opportunities for employment and for full social or political participation in their community." Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive Health*, 7 Guttmacher Rep. on Pub. Pol'y 5, 6 (2004). The availability of the oral contraceptive pill alone is associated with roughly one-third of the total wage gains for women born from the mid-1940s to early 1950s; a 20% increase in women's college enrollment; and a sharp increase in the percentage of women lawyers, judges, doctors, dentists, architects, economists, and engineers. *See* Martha J. Bailey et al., *The Opt-in Revolution? Contraception and the Gender Gap in Wages*, 19, 26 (Nat'l Bureau of Econ. Research Working Paper No. 17922, 2012), http://www.nber.org/ papers/w17922 (last visited Feb. 9, 2016); Claudia Goldin &

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[13] Moreover, as the Government and other *amici* argue, the rule is also important to protect women's health. This is particularly true for women of color who disproportionately suffer from health conditions that can be aggravated by pregnancy. *See* Br. of *Amici Curiae* Nat'l Health Law Program in Supp. of Respondent.

Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. Pol. Econ. 730, 749 (2002). As this Court has recognized, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

Moreover, the contraception rule contributes to the dismantling of outmoded sex stereotypes, including those predicated on religion, because contraception offers women the tools to decide whether and when to become mothers. The rule therefore remedies the notion, long endorsed by society, that "a woman is, and should remain the 'center of home and family life.'" *Hibbs*, 538 U.S. at 729 (quoting *Hoyt*, 368 U.S. at 62). It reinforces the fundamental premise underlying access to contraception, namely that society no longer demands that women either accept pregnancy or refrain from nonprocreative sex. As this Court has so eloquently stated, "these sacrifices [to become a mother] have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others . . . [but they] cannot alone be grounds for the State to insist she make the sacrifice." *Casey*, 505 U.S. at 852.

The contraception rule changes women's status in one other fundamental respect. Health care plans that cover preventive care that men need, but not that women need, send the message that women are second-class citizens, and that they are not employees equally valued by the employer.

For these reasons, contraception is more than a service, device, or type of medicine. Meaningful access to birth control is an essential element of women's constitutionally protected liberty. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (recognizing that sodomy laws do not simply regulate sex but infringe on the liberty rights of gays and lesbians). An exemption countenancing a religious objection to contraception suggests that religious objections are more important than women's equality in our society.

The contraception rule is thus an essential step to further equal opportunities for women. Nothing evidences the importance of the rule more clearly than the following fact: Today, approximately half of pregnancies are unintended. Guttmacher Institute, *Unintended Pregnancy in the United States* (July 2015), *available at* http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html. Several facts underlie this statistic: Many women are unable to afford contraception – even with insurance – because of high co-pays or deductibles, *see generally* Su-Ying Liang et al., *Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006*, 83 Contraception 528, 531 (2011); others cannot afford to use contraception consistently, *see* Guttmacher Institute, *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions* 5 (Sept. 2009), http://www.guttmacher.org/pubs/RecessionFP.pdf; and costs drive women to less expensive and less effective methods, *see* Jeffrey Peipert et al., *Continuation and Satisfaction of Reversible Contraception*, 117 Obstetrics & Gynecology 1105,

1105-06 (2011) (reporting that many women do not choose long-lasting contraceptive methods, such as intrauterine devices ("IUDs"), in part because of the high upfront cost).[14]

The contraception rule lifts these barriers, with the promise of increased opportunity for women. A study in St. Louis, which essentially simulated the conditions of the rule, illustrates its impact: Physicians provided counseling and offered nearly 10,000 women contraception, of their choosing, free of cost. Jeffrey Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 Obstetrics & Gynecology 1291 (2012). In this setting, 75% of the participants opted for a long-acting reversible contraceptive method, with 58% choosing an IUD. *Compare id.* at 1293, *with* Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States* (Oct. 2015), http://www.guttmacher.org/pubs/fb_contr_use.html (showing approximately 10% of all contraceptive users have IUDs as their method). As a result, among women in the study, the unintended pregnancy rate plummeted, and the abortion rate was less than half the regional and national rates. Colleen McNicholas et al., *The Contraceptive CHOICE Project Round Up*, 57 Clinical Obstetrics & Gynecology 635 (Dec. 2014). *See also* Br. of *Amici*

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[14] Long-acting methods of contraception, like IUDs, are particularly effective because there is less room for human error, unlike, for example, oral contraceptive pills. *See id.* at 1111-12 (noting that the majority of unintended pregnancies result from "incorrect or inconsistent" contraception use, but IUDs are not "user-dependent" and thus are highly effective).

Curiae the Guttmacher Institute in Supp. of the Gov't.

For all of these reasons, the contraception rule furthers the government's compelling interest in ensuring women's equality. Indeed, this Court in *Hobby Lobby* recognized the importance of "ensuring that the employees of these [objecting] entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." 134 S. Ct. at 2759-60.

This Court held that the accommodation now being challenged in these cases was a least restrictive alternative to fulfilling the government's compelling interests. It did so specifically noting that "the effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero." *Id.* The same cannot be said in this case.

If this Court accepts the employers' arguments here, the employees would undisputedly not have "precisely the same access" to contraceptives as employees of employers who have no religious objection to covering contraception. Instead, the Court would be allowing the employers to deprive their employees of a benefit guaranteed by law, namely, contraception coverage from their health insurance company. The government's compelling interests will be completely undermined because, as the government and other *amici* explain in detail, there is no other way to further the government's compelling interest in ensuring seamless contraception coverage for women. *See* Br. of *Amici Curiae* Health Policy Experts in Supp. of Respondents.

Given the absence of feasible alternatives to the contraception rule, a decision upholding the rule in this case will not be breaking new ground, but instead will be following a well-established path. Although our country has made great progress toward achieving women's equality, more work is needed, and the contraception rule is a crucial step forward.

CONCLUSION

The Court should affirm the judgments below.

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